

FINDING THE BALANCE BETWEEN LIBERTY AND SECURITY: THE LORDS' DECISION ON BRITAIN'S ANTI-TERRORISM ACT*

In December 2001, following the lead of the United States, the United Kingdom responded to September 11 by passing the Anti-Terrorism, Crime and Security Act ("ATCSA"), which contains unprecedented measures to help detect, investigate, and prosecute terrorist offenses. There has been considerable scrutiny and debate by the U.K. government, parliament, and judiciary over part 4 of the ATCSA, which allows the government to detain foreign nationals suspected of terrorism without charge or trial for an indefinite period of time.

The European Convention on Human Rights ("ECHR") would ordinarily prohibit the controversial part 4 measures through article 5(1), which protects the rights to liberty and security and prohibits executive detention without trial. However, the Home Office, Britain's department of immigration and justice, derogated from article 5(1) by introducing the Human Rights Act 1998 (Designated Derogation) Order.¹ Article 15 of the ECHR allows countries to derogate from their Convention responsibilities "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."² Under its Derogation Order, the British government declared itself temporarily immune from article 5 of the ECHR—which limits the detention of suspects to the purposes of adjudication or deportation—and thereby enabled the Home Office to introduce the measures in part 4 of the ATCSA.

The government's main, stated reason for the derogation is that "it may not be possible to prosecute the person for a criminal offence given the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required."³ Hence, the ATCSA was enacted to lower significantly the legal standards for detention of foreign nationals suspected of involvement in terrorist activities.

* The Editors would like to thank Jennifer House and Farah Paliwala for their assistance in editing this Recent Development.

1. The Derogation Order reads:

There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organizations or groups which are so concerned or of having links with members of such organizations or groups, and who are a threat to the national security of the United Kingdom. As a result, a public emergency, within the meaning of Article 15(1) of the Convention exists in the United Kingdom.

The Human Rights Act 1998 (Designated Derogation) Order 2001, No. 3644, *available at* www.hmso.gov.uk/si/si2001/20013644.htm (Nov. 13, 2001) [hereinafter Derogation Order 2001].

2. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 15, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter ECHR].

3. Derogation Order 2001, *supra* note 1.

The ATCSA authorizes the Home Office to order the detention of foreign terrorist suspects based solely on the suspicions of the Secretary of State for the Home Department. Part 4 authorizes the Home Secretary to detain and certify as an international terrorist anyone he “reasonably believes” to pose a terrorist risk to the U.K.⁴ This definition applies to anyone he suspects of having links with terrorist organizations or of planning or committing terrorist acts. The Secretary thus has full discretion over the standard of detention. Once certified, suspects can be detained indefinitely. According to section 23 of part 4, the government detains suspects with the ultimate goal of deporting them to their home country or to another country. However, the ATCSA authorizes detention even when the suspect’s “removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by a point of law which wholly or partly relates to an international agreement, or by a practical consideration.”⁵

Under part 4 of the ATCSA, the British government has indefinitely detained ten terrorist suspects in the Belmarsh and Woodhill prisons and at Broadmoor High Security Hospital since 2001.⁶ In most of these cases, the Home Office has maintained that the detainees may face torture in their home country and that deportation under these circumstances would contravene the obligations of the U.K. under the U.N. Convention Against Torture and the U.N. Convention on the Status of Refugees.⁷ “[P]ractical consideration[s]” may prevent deportation as well.⁸ Such obstacles to deportation have produced a legal limbo in which the suspects are subject to indefinite detention without charge or trial.

The Special Immigration Appeals Commission (“SIAC”), which is authorized to review the detentions, holds special hearings to determine whether the Home Secretary’s suspicions are based on “reasonable grounds.”⁹ The SIAC hearings differ from judicial trials in three important ways. First, citing its sensitive nature, the government conceals its most incriminating evidence from the suspect and his attorney as “closed evidence.” Second, suspects cannot bring or cross-examine witnesses. Instead, to provide for the suspect’s defense during the “closed sections” of a case (which usually predominate the hearing), the government appoints a “Special Advocate” with

4. Anti-Terrorism, Crime and Security Act 2001, ch. 24, pt. 4, § 21(1), available at <http://www.legislation.hmso.gov.uk/acts/acts2001/20010024.htm> [hereinafter ATCSA].

5. *Id.* § 23(1).

6. *Terror Suspects Launch New Legal Challenge*, GUARDIAN (London), July 7, 2004, at <http://www.guardian.co.uk/terrorism/story/0,12780,1256057,00.html>.

7. The Convention Against Torture prohibits a state from extraditing, expelling, or returning a person to a state where there are “substantial grounds for believing that he would be in danger of being subject to torture.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, art. 3, 1465 U.N.T.S. 85 (entered into force June 26, 1987). Article 33 of the Refugee Convention prohibits states from returning people to countries where their life or security would be threatened as a result of prosecution. Convention Relating to the Status of Refugees, *adopted* July 28, 1951, art. 33, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

8. ATCSA, *supra* note 4, pt. 4, § 22(1)(b).

9. *Id.* § 25(2).

whom the suspect has no contact during the hearing, while another attorney handles the case's open sections. If the hearing ultimately overturns the suspect's certification, under section 27(9), the Home Secretary can still recertify the suspect "whether on the grounds of a change in circumstance or otherwise."¹⁰ As such, the Home Secretary is empowered to detain suspects even after the SIAC has invalidated their detention, effectively giving him veto power over SIAC decisions.

Because of this low standard of review for detentions and the apparent lack of safeguards for the rights of suspects—elements of the ATCSA that are arguably incompatible with the ECHR—the SIAC process and part 4 of the ATCSA have come under severe parliamentary and judicial scrutiny.¹¹

OFFICIAL REVIEW

The two official bodies responsible for reviewing ATCSA measures to determine their compliance with domestic and international law are the Parliament's Joint Committee on Human Rights and the Privy Counsellor Review Committee. Consisting of Parliament members, the Joint Committee reviews any legislation or government action that concerns human rights.¹² Consisting of current and former Parliament members, government officials, and judges, the Privy Counsellor Review Committee was appointed by the Home Secretary in April 2002 to review the ATCSA.¹³

Both bodies have strongly criticized ATCSA measures and have called for sweeping changes to bring the ATCSA into compliance with international human rights standards. The Joint Committee's most recent report stressed the inadequacy of the government's derogation. The report concludes that the derogation powers are inappropriate because long-term policy changes are required to address the terrorist threat, whereas derogations are designed to be temporary responses to emergencies. The Committee stated that it is "absolutely imperative" that the Home Office find another way to address terrorism that eliminates the need for the derogation.¹⁴ Failing to do so, it declared, will "undermine the State's commitment to human rights and the rule of law, and diminish the State's standing in the international community."¹⁵ The Privy Counsellor Review Committee also urged the government to repeal part 4 of the ATCSA, stating that its members "do not believe that

10. *Id.* § 27(9).

11. See JOINT COMM. ON HUM. RTS., EIGHTEENTH REPORT (2004), available at www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/158/15802.htm (July 21, 2004).

12. See *id.* at Terms of Reference.

13. PRIVY COUNSELLOR REVIEW COMM., ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 REVIEW (2003), ¶¶ 69–70, available at <http://www.liberty-human-rights.org.uk/issues/internment-newton-report.pdf> (Dec. 18, 2003).

14. JOINT COMM. ON HUM. RTS., *supra* note 11, ¶ 5.

15. *Id.*

Part 4 is a sustainable way of addressing the problem of terrorist suspects in the United Kingdom.”¹⁶

JUDICIAL REVIEW

On July 30, 2002, in *A & Others v. Secretary of State for the Home Department*, the SIAC found that detention practices permitted under part 4 of the ATCSA were discriminatory and thus violated article 14 of the ECHR.¹⁷ However, the Court of Appeal, deferring to the discretion of the Home Secretary, ruled that circumstances justified the discriminatory nature of part 4 and overturned the SIAC’s judgment.¹⁸ For the next year and a half, the SIAC consistently denied suspects’ detention appeals.

In early 2004, the tide suddenly turned in the favor of detainees in what became known as the *M Case*.¹⁹ A Libyan national, “Mr. M,” appealed to the SIAC in early 2004 because he was accused of being connected to Al Qaeda through an anti-Ghadafi organization in Libya. After a three-day hearing examining the sufficiency of the government’s original grounds for detention, the SIAC ruled that the government had not established a reasonable suspicion that Mr. M was a “suspected international terrorist,” and the evidence on which the security services had based their assessment was “wholly unreliable and should not have been used to justify detention.”²⁰ The SIAC also criticized the actions of the government, calling its assertions “clearly misleading” and “inaccurate” exaggerations of how much the evidence supported any link to Al Qaeda.²¹ On March 8, 2004, the SIAC cancelled Mr. M’s certification as an international terrorist and ordered his immediate release.

The Home Secretary appealed to the Court of Appeal, arguing that the SIAC’s decision did not meet a baseline standard of judicial review because it was “one to which no reasonable tribunal, in the position of SIAC, could have come.”²² The government’s lawyers characterized the decision as “irrational and unreasonable” and maintained that the evidence established a strong enough link to Al Qaeda to detain the suspect.²³

16. PRIVY COUNSELLOR REVIEW COMM., *supra* note 13, ¶ 64.

17. *A & Others v. Sec’y of State for the Home Dep’t*, SIAC No. SC/1-7/2002 (July 30, 2002).

18. *A, X, Y & Others v. Sec’y of State for the Home Dep’t*, EWCA Civ. 1502, No. C/2002/1710 (Eng. C.A. Oct. 25, 2002), available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2002/1502.html&query=A,+X&method=all>.

19. *Sec’y of State for the Home Dep’t v. M*, EWCA Civ. 324, No. C2/2004/0516 (Eng. C.A. Mar. 18, 2004), available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2004/324.html&query=M+v+Secretary&method=all>.

20. Audrey Gillan, *Defeat for Blunkett as Judges Free Detainee*, GUARDIAN (London), Mar. 19, 2004, available at <http://www.guardian.co.uk/libya/story/0,14139,1173176,00.html>.

21. Audrey Gillan, *Judges Accuse Blunkett over Terror Suspect*, GUARDIAN (London), Mar. 9, 2004, available at <http://www.guardian.co.uk/guardianpolitics/story/0,3605,1165089,00.html>.

22. *Sec’y of State for the Home Dep’t v. M*, EWCA Civ. 324, ¶ 29.

23. *Terror Suspect Decision Delayed*, BBC NEWS (London), Mar. 17, 2004, available at <http://news.bbc.co.uk/1/hi/uk/3517920.stm>.

On March 18, 2004, with Lord Chief Justice Woolf, Justice Potter, and Justice Clarke presiding, the Court of Appeal denied the government's application for appeal and upheld the SIAC's order to release Mr. M. The Court reasoned:

SIAC came to a judgment adverse to the Secretary of State. It has not been shown that this decision was one to which SIAC was not entitled to come because of the evidence, or that it was perverse, or that there was any failure to take into account any relevant consideration. It was therefore not defective in law.²⁴

Chief Justice Woolf also declared that "if a person is detained as M was detained, that individual should have access to an independent tribunal or court which can adjudicate upon the question of whether the detention is lawful or not. If it is not lawful, then he has to be released."²⁵ The Court's ruling not only empowered the SIAC by holding for the first time that the Commission should have the power to overrule the Home Secretary's decisions, but also highlighted the importance of the SIAC as an independent tribunal authorized to free unjustly detained suspects. However, the opinion never addresses the ATCSA provision that allows the Home Secretary to re-detain released suspects based on "a change of circumstance."²⁶ According to Kate Allen, the director of Amnesty International U.K., "[t]he verdict highlights the very real dangers of legislation that allows the U.K. government to detain people without charge or trial on the basis of secret 'evidence' that would not stand up in a court of law."²⁷

One of the most important elements of the Court of Appeal decision is the Court's clarification that in order to associate the derogation measure with the particular national emergency occasioning the derogation, the government must allege that those detained and possibly deported under part 4 have direct links with Al Qaeda.²⁸ The government could not use the measures to detain, for example, Irish Republican Army suspects, since such detentions would not relate to the ATCSA's purpose. The Court of Appeal thus limited the government's derogation authority to the specific and extraordinary situation that prompted the introduction of the ATCSA.

24. Sec'y of State for the Home Dep't v. M, EWCA Civ. 324, ¶ 33.

25. *See id.* ¶ 34.

26. ATCSA, *supra* note 4, ch. 24, pt. 4, § 27(9).

27. Karen McVeigh, *Libyan with Alleged Al-Qaeda Links Goes Free*, SCOTSMAN, Mar. 19, 2004, at <http://thescotsmen.scotsmen.com/index.cfm?id=316942004>.

28. *See* Sec'y of State for the Home Dep't v. M, EWCA Civ. 324, ¶ 11, stating:

[T]hose powers cannot be exercised . . . in respect of someone whom [the Home Secretary] does not reasonably suspect or believe to be a risk to national security because of his connection to the public emergency threatening the nation—namely the threat posed by Al Qa'ida and its associated networks. Thus it is not enough that the person detained may have had connections with a terrorist organisation. It must be a terrorist organisation which has links with Al Qa'ida.

THE HOUSE OF LORDS DECISION

The *M Case* set the stage for another appeal, resulting in the December 2004 House of Lords decision declaring that the ATCSA detention measures are inconsistent with the U.K.'s international human rights obligations. On August 11, 2004, the ten detainees at Belmarsh and Woodhill prisons and at Broadmoor High Security Hospital appealed the SIAC's decision that the Home Secretary had "sound material" to support their detention. They challenged not only the detention measures but also the legality of the SIAC process. The Court of Appeal ruled against the detainees on all counts but one: namely, that deported suspects should have the right to appeal their certification as "suspected international terrorists" from abroad. Regarding the detainees' main claim that the SIAC's standard of review is too relaxed, the Court ruled that the SIAC mandate includes examining the reasonableness of the grounds for suspicion, but not evaluating the suspicion itself, thus permitting the SIAC to defer to the Home Secretary's judgment. The second part of the Court's holding sanctioned the use of evidence that may have been obtained through torture, stating:

[I]t would be contrary to the exercise of the statutory power as intended by Parliament, and also unrealistic, to expect the Secretary of State to investigate each statement with a view to deciding whether the circumstances in which it was obtained involved a breach of Article 3 [of the ECHR].²⁹

The Court also stated that article 15 of the U.N. Convention Against Torture, which prohibits using evidence obtained by torture, is not part of U.K. domestic law and cannot be applied in this case without undermining the power the ATCSA gives the Home Secretary.³⁰

Following the decision by the Court of Appeal, the ten suspects attempted for the first time and succeeded in appealing before the U.K.'s highest judicial body, the House of Lords.³¹ Because the House of Lords believed that *A & Others* had extraordinary constitutional importance, the panel included nine rather than the usual five Lords. The appeal asked: Are the government's derogation-based detention powers under the ATCSA consistent with the derogation standards set forth in the ECHR?

In their main argument, the appellants challenged the proportionality of the government's derogation-based measures. The Lords interpreted article

29. *Ajouaou v. Sec'y of State for the Home Dep't*, EWCA Civ. 1124, No. C2/2003/2796, ¶ 129 (Eng. C.A. Aug. 11, 2004) (appeal taken from the SIAC), available at <http://www.courtservice.gov.uk/judgmentsfiles/j2769/ajouaou-v-sshd.htm>. See also ECHR, *supra* note 2, art. 3 (stating that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment").

30. See *Ajouaou*, EWCA Civ. 1124, ¶ 133.

31. *A & Others v. Sec'y of State for the Home Dep't*, UKHL 56 (House of Lords Dec. 16, 2004) (appeal taken from 2002 EWCA Civ. 1502), available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf>.

15 of the ECHR to require that any derogation measures be adequate and proportional responses to Al Qaeda's threat. They based this standard on the principle in *de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, in which the Privy Council held that in determining whether a limitation is arbitrary or excessive, the court must ask itself:

[W]hether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.³²

Without ruling on the first element—whether the threat posed by Al Qaeda is grave enough to justify curbing the right not to be indefinitely detained—the Lords ruled in favor of the appellants' claim that the ATCSA measures fail to satisfy the second and third elements. The appellants had made three key points in their claim. First, U.K. nationals suspected of posing a terrorist threat are not subject to the ATCSA measures. Second, in deporting suspects, the ATCSA allows suspected terrorists to continue their activities abroad. Finally, the ATCSA permits the government to detain suspects who have no link to Al Qaeda, exceeding the scope of the derogation order.³³ The Court supported its ruling with statements by the European Commissioner of Human Rights, who observed in his report on the ATCSA:

The derogating measures of the Anti-Terrorism, Crime and Security Act allow both for the detention of those presenting no direct threat to the United Kingdom and for the release of those of whom it is alleged that they do. Such a paradoxical conclusion is hard to reconcile with the strict exigencies of the situation.³⁴

The Court also referenced statements by the Privy Counsellor Review Committee, which declared in its official review of the ATCSA powers “[w]e are not persuaded that the powers are sufficient to meet the full extent of the threat from international terrorism. Nor are we persuaded that the risks of injustice are necessary or defensible.”³⁵ For these reasons, the Court concluded that the ATCSA detention measures do not adequately address their stated threat and therefore fail to meet their legislative objective.

The Lords also focused on a second argument stating that it is the courts that should decide whether deprivations of liberty resulting from the ATCSA are a proportional response to the terrorist threat. This argument evoked the government's strongest response. The Home Office argued that “these [are]

32. *Id.* ¶ 30 (quoting *de Freitas*, 1 A.C. 69, 80 (P.C. 1999)).

33. *See id.* ¶ 31.

34. *Id.* ¶ 34 (citation omitted).

35. *Id.*

matters of a political character calling for an exercise of political and not judicial judgment,”³⁶ and that national security concerns fall within the discretion of the “democratic organs of the state.”³⁷ Rejecting this argument, the Lords based their decision on both ECHR precedent and parliamentary intent underlying the ATCSA. Among other ECHR cases, the Lords cited the holding in *Aksoy v. Turkey* that “[j]udicial control of interferences by the executive with the individual’s right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimize the risk of arbitrariness and to ensure the rule of law.”³⁸

The Court also observed that the U.K.’s 1998 Human Rights Act specifically empowers the judiciary to strike down any public act inconsistent with the ECHR and created a right to appeal legislation by challenging the underlying derogation. Affirming its authority to assess the proportionality of the ATCSA measures, the Court held that the measures are not proportional. Citing article 14 of the ECHR, which prohibits discrimination,³⁹ the Court stated that “[w]hat cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another.”⁴⁰ The Court held that because U.K. citizens are not subject to the ATCSA, the ATCSA is discriminatory and inconsistent with the standards for derogation measures established under article 15 of the ECHR and other international law obligations of the U.K.

Lord Hoffmann’s concurring opinion addressed what he considered to be the most important technical issue on appeal: whether there exists a “war or other public emergency threatening the life of the nation.”⁴¹ He found that, though serious, the threat from terrorism does not “threaten our institutions of government or our existence as a civil community” and as such does not threaten the fabric of organized society.⁴²

The sole dissenting opinion came from Lord Walker. He ruled in favor of the government on the grounds that the current safeguards in the ATCSA limit derogation measures to those that are strictly necessary. Lord Walker noted, for example, that the Home Secretary’s powers are temporary and subject to review by the SIAC. He also referenced the official report by the Privy Counsellor Review Committee.⁴³ Interestingly, the majority also used findings in this report concerning potential ECHR violations of the ATCSA

36. *Id.* ¶ 37.

37. *Id.*

38. *Id.* ¶ 41 (quoting *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1997)).

39. ECHR, *supra* note 2, art. 14 (stating that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

40. *A & Others*, UKHL 56, ¶ 68.

41. *Id.* ¶ 88.

42. *Id.* ¶ 96.

43. *Id.* ¶ 217.

to support its conclusion that the ATCSA measures are inadequate, disproportionate, and discriminatory.

The House of Lords decision culminated in an order that quashed the Human Rights Act 1998 (Designated Derogation) Order 2001, and thus invalidated the ATCSA's detention provisions. The decision signals a dramatic shift in the relationship between the Home Office and the U.K. courts with respect to measures on terrorism. While the SIAC and the Court of Appeal had previously consistently deferred to the Home Office, the House of Lords in *A & Others* reasserted the authority of the judiciary to determine the proportionality of ATCSA measures. This power shift will likely significantly impact the way in which the U.K. government implements and reviews measures on terrorism. The Lords' decision may mark the beginning of stricter scrutiny of anti-terrorism provisions by the judiciary and a more robust commitment to accountability and transparency by the Home Secretary.

The Lords in *A & Others* also emphasized and relied heavily on the official reviews of the Privy Counsellor Review Committee and Parliament's Joint Committee on Human Rights. As such, this decision may encourage other government bodies to scrutinize more closely how the Home Office conducts its war on terror. Furthermore, the decision by Britain's highest court that the government cannot derogate from key procedural rights may generate additional pressure for the United States to reevaluate its own detention practices respecting terrorist suspects. Britain's efforts to strike a more appropriate balance between individual rights and collective security may indirectly influence how the U.S. government views the balance.

WHAT NOW? THE GOVERNMENT'S RESPONSE

The response of the Home Office to the Lords' decision has ignited great controversy as many consider it to be inadequate and dismissive. As a result of political scandal, Home Secretary David Blunkett resigned in December 2004, leading to the hasty appointment of former Education Secretary Charles Clark. Because the House of Lords' decision was handed down on Clark's first day, the Home Office has been able to delay its response to the ruling. In his first official statement on the matter, Clark indicated that the decision would not prevent him from asking Parliament to renew the ATCSA later this year. Regarding possible revisions to the law to bring it in compliance with the decision, he stated that the Home Office "will be studying the judgment carefully to see whether it is possible to modify [the] legislation to address the concerns raised by the House of Lords."⁴⁴ The Home Office's proposed changes to the ATCSA, however, have triggered strong criticism from the human rights community and some government officials, such as Foreign Office Minister Chris Mullin. The proposed changes include replacing detention

⁴⁴. *Terror Detainees Win Lords Appeal*, BBC NEWS WORLD EDITION, Dec. 16, 2004, at http://news.bbc.co.uk/2/hi/uk_news/4100481.stm.

with “control orders” that may include house arrest.⁴⁵ In response to the Court’s holding that the ATCSA is discriminatory, the Home Office proposes to apply part 4 measures to both U.K. and foreign nationals suspected of terrorism. Moreover, Clark has refused to release the detainees until the revised measures are implemented, because “[t]here remains a public emergency threatening the life of the nation.”⁴⁶ British human rights groups have described the proposed “control orders,” which do not require judicial authorization, as a mere extension of the arbitrary executive detention struck down by the House of Lords. Shami Chakrabarti, spokeswoman for the human rights group Liberty, exemplifies this sentiment: “Adherence to the rule of law should not be a game of cat and mouse. The government should not swap one human rights ‘opt out’ for another.”⁴⁷

PROPOSALS FOR CHANGE

While the Home Office has proposed changes to the ATCSA that still deprive suspects of their liberty without charge or trial, the Privy Counsellor’s Review Committee and Parliament’s Joint Committee proposed in their official reports that the Home Office pursue claims against terrorist suspects through established judicial avenues. Both committees agree that the best way to safeguard human rights while protecting national security interests is a system in which the government formally charges and tries terrorist suspects without resorting to a special court system or executive detention of any kind. By requiring the Home Office to gather and present to a regular court evidence that is sufficient to press charges and convict the suspect, such a system would promote transparency and reduce the likelihood of a wrongful deprivation of liberty. Such a system would also eliminate the need to derogate from article 5 of the ECHR, and would bring the Home Office’s terrorism measures into accord with the House of Lords’ *A & Others* decision.

Among the reforms proposed by the Privy Counsellor Review Committee and the Joint Committee, a key proposal is the introduction of an investigative approach in which a security-cleared judge gathers evidence on both sides of a case and assembles a balanced record consisting of both sensitive and non-sensitive evidence. A trial judge presented with the evidence would then try the case in a conventional manner. An amendment to this proposal suggested by the Joint Committee is for a magistrate to examine and translate sensitive evidence into non-sensitive evidence by omitting methods used and informants’ names. The Joint Committee drew its suggestion from the model used by the French government to prosecute cases with classified information.⁴⁸

⁴⁵. *Terror Suspects Face House Arrest*, BBC NEWS U.K. EDITION, Jan. 26, 2005, at http://news.bbc.co.uk/1/hi/uk_politics/4207295.stm.

⁴⁶. *Id.*

⁴⁷. *Id.*

⁴⁸. The Joint Committee described the principle underlying its recommendation with the following example:

Such a system would afford a suspect the opportunity to challenge the evidence against him, without sacrificing security concerns. This approach, which complies with guideline 9.3 of the Council of Europe's *Human Rights Guidelines* (which permits anonymous testimony as long as witness statements can be examined), would not only allow for more neutral evidence-gathering, but would also protect the government's interest in sensitive information. By relying on a neutral judge to gather and record evidence, this system provides a way for suspects to be properly charged and tried. This approach grants each suspect full judicial process, as opposed to relying on indefinite detention without trial, and creates a more permanent solution to replace the unsustainable "emergency" powers of the ATCSA detention measures.

This alternative better addresses the U.K.'s human rights obligations by eliminating the need for derogation-based detention, and also promises more effective and consistent protection of security concerns. The Home Office's "control orders," by contrast, are an inadequate, temporary fix to a long-term problem. The control orders continue to threaten the arbitrary deprivation of liberty, potentially triggering the same concerns that the Lords emphasized in *A & Others*. Adopting a system in which the government must formally charge and try terrorist suspects pursuant to the safeguards built in to the judicial system is arguably the only way the U.K. can effectively address the terrorist threat without derogating from its human rights obligations.

The degree to which the House of Lords' decision will impact the government's response to terrorism depends directly on the willingness of the Home Office to respond to the recommendations of government committees that officially review the ATCSA. While the Lords' decision may represent the first step in a shift toward a more balanced and sustainable response to terrorism that does not require derogation from international treaties, Secretary Clark's most recent statements are an ominous reminder that the Home Office retains the authority to introduce any measures it deems necessary, limited only by the protracted review processes of the courts and Parliament. At the same time, the House of Lords decision suggests the judiciary's willingness to function as an ultimate safeguard against measures that contravene international human rights standards. If the Home Office continues to disregard the reform measures proposed by the Privy Counsellor Review Committee and Parliament's Joint Committee, the Lords' decision may signal an emerging power struggle between different government bodies to shape the content and direction of Britain's anti-terrorism measures. If the Home Office, instead, utilizes the proposals to establish a process in which the government must bring formal charges against suspects and incorporate terrorism cases

[W]e were told that the identity of sources of intelligence material might be protected by including [sensitive] information in witness statements from their superiors within the intelligence agencies . . . [T]his would still give the defence an opportunity to challenge that information, even without the opportunity to cross-examine the source of the information.

JOINT COMM. ON HUM. RTS., *supra* note 11, ¶ 60.

into Britain's established judicial system, the U.K.'s approach could become a model for the U.S. and other countries to strike a better balance between individual rights and national security.

—Alexandra Chirinos